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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 75-[illegible]

In the matter of:

Lanis Hurst
Petitioner

-v-

United States of America
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Lanis Hurst
Box FCI # 56031-131
Atlanta, Georgia 30315

Petitioner Pro Se

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. _____

Landis Durst
Petitioner,

-v-

United States of America
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PROCEEDINGS BELOW

This petition for writ of certiorari is filed to obtain a review by this Court of the case of Landis Durst v. United States of America, Case No. 75-2251 decided by the United States Court of Appeals for the Sixth Circuit on January 9, 1976, and unreported. That decision affirmed a decision of the United States District Court for the Eastern District of Michigan, Southern Division at Detroit, which denied a motion to vacate sentence filed pursuant to 28 U.S.C. § 2255.

On June 16, 1972, the Petitioner was indicted on the charge of armed robbery in violation of 18 U.S.C. 2113 (a), (d). On October 13, 1972, he was found guilty of this offense by a jury in the United States District Court for the Eastern District of Michigan, Southern Division at Detroit, and on December 28, 1972, he was sentenced by Judge Freeman to the custody of the Attorney General of the United States for a period of twenty years.

Petitioner thereafter filed a pro-se motion to vacate sentence because his court appointed attorney failed to file a notice of appeal. The District Court granted the motion, vacated the sentence and on November 12, 1973 reinstated the same sentence in order for the Petitioner to have a direct appeal.

New counsel was subsequently appointed by the Court of Appeals for the Sixth Circuit to perfect Petitioner's direct appeal. The judgment of the District Court was affirmed in an order dated February 10, 1975.

Petitioner again filed a motion to vacate because he had been forced to share a single attorney with a confessing co-defendant in a joint trial and because he had been grossly misrepresented on direct appeal in that no issues whatsoever were raised urging the Appellate Court to grant him a new trial. Two issues were raised for Petitioners co-defendant, and the Petitioners name was only used in the caption of the decision. On August 21, 1975, the District Court for the Eastern District of Michigan, Southern Division at Detroit filed a memorandum opinion and order denying this motion. The opinion of the District Court in Case No. is reproduced in the appendix to this brief.

The decision of the District Court was affirmed by order of the United States Court of Appeals for the Sixth Circuit by order dated January 9, 1976.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was decided and filed on January 9, 1976. The case involved the questions of whether or not the Court of Appeals was correct in deciding that the Petitioner was not denied the effective assistance of counsel before and throughout his trial by being forced to share a single attorney with a confessing co-defendant in a joint-trial, and whether or not the Court of Appeals was correct in deciding that the Petitioner was not denied effective assistance of counsel on direct appeal by appointed counsel failing to raise any issue whatsoever on appeal or to seek permission from the Court to withdraw from the case if in his opinion an appeal would be frivolous. The Petitioners rights to due process of law is claimed under the Sixth Amendment of the Constitution of the United States.

The Supreme Court of the United States has jurisdiction to review this case under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

(1) THE [illegible] ASSISTANCE OF COUNSEL [illegible] CO-DEFENDANT IN A JOINT TRIAL.

(2) THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL BY APPOINTED COUNSEL FAILING TO RAISE ANY ISSUE WHATSOEVER ON APPEAL [illegible] TO SEEK [illegible] FROM THE COURT TO WITHDRAW [illegible] THE CASE IF IN HIS OPINION AN APPEAL WOULD BE FRIVOLOUS.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction and application of the Sixth Amendment of the Constitution oft the United States, which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense."

The statute upon which the jurisdiction of this Court is based is 28 U.S.C. § 1254, which provides as follows:

> "<u>Courts of Appeals - Certiorari - Appeal - Certified Questions --</u>
>
> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> "(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;
>
> (3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

THE FACTS

On August 1, 1972, a Federal Grand Jury for the Western District of Michigan returned an indictment charging Petitioner and three others with the offense of armed robbery, in violation of title 18, USC, Section 2113 (a),(d). Petitioner had been arrested on July 27, 1972 by Agents of the FBI pursuant to a complaint sworn to before U.S. Magistrate, Paul J. Komives.

Attorney James T. Roberts, Chief Defender of the Federal Defenders Office; 600 Woodward Avenue; Detroit, Michigan, was appointed to represented Petitioner and Thomas Sims, one of the three other persons indicted along with the Petitioner.

A trial for Petitioner and co-defendant,Thomas Sims began on October 11, 1972. During the course of the trial, a confession was entered into the evidence allegedly made by co-defendant Sims to Special Agent Crawford while Sims was in a local jail prior to arraignment. Sims chose not to testify in his own behalf at trial, thereby prohibiting Petitioner from Cross-examining him with respect to the broad scope of the confession and the reasonable inference a jury might draw from it that would indicate guilt on the part of the Petitioner.

Obviously no objections were made and no limiting instructions were requested by counsel concerning the alleged confession because to do so would have highlighted the confession, to the detriment of and in prejudice to Petitioners co-defendant, Thomas Sims. The court gave no limiting instructions.

The jury returned a verdict of guilty and on December 28, 1972, the Petitioner and his co-defendant were sentenced to twenty (20) years.

New counsel was subsequently appointed by the Court of Appeals for the Sixth Circuit to perfect Petitioners appeal. The judgement of the District Court was affirmed in an order dated February 10, 1975. Newly appointed counsel, Mr. Timothy A. Fischer; 2205 Carew Tower; Cincinnati, Ohio 45202, grossly misrepresented the Petitioner on direct appeal in that no issues whatsoever were raised urging the Appellate Court to grant Petitioner a new trial nor did counsel have to withdraw from the case. Two issues were raised for Petitioner's co-defendant, but Petitioners name was only used in the caption of the decision.

Petitioner thereafter submitted a motion to vacate to the District Court raising, the issues of ineffective assistance of counsel before and during his trial, and on his direct appeal. The District Court denied the motion. Following a timely filing of a notice of appeal, the Court of Appeals for the Sixth Circuit affirmed the judgement of the district Court and failed to even comment upon the serious allegations that Petitioner has been denied due process throughout the entire course of his incarceration.

REASONS TO ALLOW WRIT

(1)
AS A RESULT OF BEING FORCED TO SHARE A SINGLE ATTORNEY WITH HIS CO-DEFENDANT IN A JOINT TRIAL, PETITIONER-APPELLANT WAS DENIED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR AND IMPARTIAL TRIAL, AND THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, WHAT IS, THE CO-DEFENDANT WHO DID NOT TAKE THE STAND BUT WHOSE STATEMENT WAS ERRONEOUSLY USED TO HIS PREJUDICE.

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense."

Because the Sixth Amendment right to the "assistance of counsel" contemplates that such assistance be unimpaired by one lawyer simultaneously representing conflicting interests (otherwise the interests of one defendant might be prejudiced by lack of effective representation), a conflict of interest is a form of ineffective assistance of counsel. See: Glasser v. United States, 315 US 60,(1942). Grounds for conflict arise, e.g., where the effective defense of one client rests on attacking the credibility of another, when counsel can foresee that he would have to stress certain factors as to one defendant to the detriment of another or where one defendant seeks to place the entire burden of guilt on his co-defendant. See, generally Cipes & Perry ack r, Assignment of Counsel in State Courts, in 1 Cipes, Criminal Defense Techniques § 11.06 (1972); Note, 16 U.C.L.A. L. Rev. 628 (1969). See also: Courtney v. United States, 486 F. 2d 1168 (9th Cir. 1973).

A.B.A. Standards, The Defense Function § 3.5 (b) (1971) provides: "Except for preliminary matters --- a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty of another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develope and when the several defendants give an informed consent to such multiple representations."

In the case subjudice, the Petitioner was deprived of his rights under the 6th Amendment by being forced to share a single attorney with his co-defendant in a joint trial.

A case with issues very similar to the issues here, is Dollar v. United States, 376 F. 2d 283 (C.A.D.C. 1967). Dollar and co-defendant were charged with armed robbery. They were indigent and the Court assigned the same Attorney to represent both of them. On Appeal Dollar argued that the trial Court deprived him of the effective assistance of counsel by requiring him to share a single attorney with his co-defendant.

The D.C. Circuit Court of Appeals framed the issues as follows:

(a) Did the District Court consider the possibility of prejudice?

(b) Did the District Court advise appellant of his right with respect to seperate counsel?

(c) Did Appellant waive his rights?

(d) Was Appellant prejudiced?

With respect to the first two issues, the Court pointed out that the record was silent:

> "We have been given no explanation for this omission and are unable to construct a satisfactory answer of our own. Certainly it is in contravention of long standing principles of both this Court and the Supreme Court."

There being nothing in the record to indicate that the trial judge had informed the defendant of their rights, the Court could not find a waiver. Thus the only remaining issue was prejudice.

The Court then adopted the following formulation to determine prejudice:

> "We hold, therefore, that only where 'we can find no basis in the record for an informed speculation' that appellant's rights were prejudicially affected can the conviction stand. Anderson v. United States, 352 F. 2d 915, 917 (1965); Hutton v. United States, 345 F. 2d 347, cert. denied, 382 US 856 (1965)."

The Court went on to say:

> "In effect, we adopt the standard of 'reasonable doubt'--a standard the Supreme Court recently said must govern whenever the prosecution contends the denial of a constitutional right is merely harmless error. Chapman v. California, 386 US 18"

The Court reversed and remanded for a new trial.

The complex question of what constitutes "effective assistance of counsel" arises from the landmark decision of Powell v. Alabama, 287 US 45 (1932). The Supreme Court did not elaborate on the term, "effective assistance of counsel" but stated:

> ".....That duty (to appoint counsel) is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation of trial of the case."

The frequency with which "effectiveness" argument was employed increased with the Supreme Court's subsequent decision in Johnson v. Zerbst, 304 US 458 (1938) that in all federal criminal prosecutions the accused must have the assistance of counsel for his defense. In Gideon v. Wainwright, 372 US 335 (1963), it was established that once a serious offense has been committed, whether it is a state or Federal proceeding, the defendant is entitled to counsel in order that a fair trial be assured. Similarly, with respect to when representations should be afforded, once it is determined that proceedings have reached a "critical stage", the defendant is entitled to counsel, see, e.g., White v. Maryland, 373 US 59 (1963).

In neither situation does the Court require a showing of prejudice. The determination is prospective: THE ACCUSED COUNSEL MUST BE EFFECTIVE.

In the case at bar prejudice the petitioner submits that he has been prejudiced and should be granted relief. The respondent will argue that petitioner did not make known to the court that he was dissatisfied with joint representation before trial. The petitioner submits that his organic right to individual effective assistance of counsel was denied him when the trial court appointed, without making a general inquiry into the circumstances involved, one attorney to represent him and his co-defendant, Thomas Sims. See, e.g., Holloway v. Arkansas, 435 U. S., 475.

The Supreme Court of Florida rendered a decision in Baker v. State, 252 So. 2,24 [illegible] that was predicated upon the case of Glasser v. United States, 315 U.S. 60. In Glasser, supra, the court held:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Therefore, the constitutional issues as raised cannot be held in dispute. The record will reflect certain pertinent facts that Petitioner sets forth as follows:

(1) That, the Petitioner and Thomas Sims, co-defendants before the bar, were simultaneously represented by James E. Roberts throughout proceedings.

(2) That, Attorney James E. Roberts failed to inform the Petitioner of the inherent dangers of conflicting interest and failed to inform the Petitioner of his organic right to seperate counsel.

(3) That, the trial judge was direlict in his duties as, he failed to inform the Petitioner of the constitutional rights being waived; and by such action the record is silent where the Petitioner intelligently and knowingly consented to joint representation.

(4) That, the trial judge was direlict in his duties as, he failed to inform the Petitioner of the inherent danger of conflicting interest and did not advise the Petitioner of his organic right to seperate counsel.

In the CODE OF ETHICS GOVERNING ATTORNEYS 32 F.S.A., Rules 4,5,6 and 37 et seq., properly construed, Attorney James E. Roberts acceptance in representing the Petitioner and his co-defendant in the case subjudice, void of admonishments to the dangers and pitfalls therein, was highly unethical and illegal. The Supreme Court of Florida stated in Baker v. State, supra:

> "Our canons of ethics also condemn an appointment which would require an attorney to simultaneously and jointly represent co-defendants unless those represented expressly consent...while these canons were designed primarily to govern privately retained by free choice of a client the reasons for their adoption and principles to be served are equally important in cases where counsel is furnished by Order of court. That which an attorney cannot do when retained by a client is no less unethical when the representation is pursuant to Court Order."

In Baker v. State, supra, the court stated in part:

> "It is this conflict and inconsistency of position which makes it impossible for the same counsel to effectively represent two or more co-defendants simultaneously."

In Love v. District of Columbia, 329 A. 2d 332, the court held that it matters not whether counsel was retained or appointed. Further in Love, supra, the Court stated the duties of the trial judge were as follows:

> "....the trial judge has the responsibility to inquire if Attorney has evaluated potential conflicts involved in such joint representation and has apprised his client of any risks; the trial judge must make and affirmative, on the record determination that the several defendants assume the risk of joint representation."

In the case at bar, the trial record will reveal that the Court failed to make an affirmative on the record determination. The record clearly indicates that the trial judge made no inquiries whatsoever,, pertinent to the issues involved.

In Campbell v. United States, 352 F. 2d 359 (1965) the court expressed their viewpoints on the instant issue as follows:

> "...the judges responsibility is not necessarily discharged by simply accepting the co-defendant declaration of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney had made such an appraisal or had advised his client of the risk. Consideration of effective judicial administration as well as the instant rights of defendants have intelligently waived or chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information or availability of assigned counsel. We must indulge every reasonable presumption against unimpaired assistance of counsel."

Again in the instant case, the court made no inquiries, the Attorney failed to inform the Petitioner of the "conflict of interest"; the "pitfalls" and "risks" involved; and the Petitioner unlearned in criminal law and trial procedure did not learn of his lawyers inadequacies and the trial courts error until after the trial was over and the dir et appeal had been denied.

As one example, Petitioner points out that in the course of the trial resulting in this conviction, the U.S. Attorney called on Special Agent James Crawford to testify. Im portinent part re ating to the argument is Mr. Crawford's testimony:

> A: He stated that he anticipated that he would be arrested on this ch...
>
> THE COURT: Excuse me - I cannot hear you.
>
> A: - that he anticipated that he would be arrested on this charge and pretty much resolved himself to the fact that he would be doing twenty years for this offense. He also made a remark that he knew it was bad when he left the place.
>
> Q: Is that the extent of his remark?
>
> A: There was something said in jest somewhat - "You win some, you lose some, and I know it was bad when I left the place."

Petitioner submits that this was highly prejudicial to him, especially in

light of the fact that:

(1) [illegible]

(2) [illegible]

It appears that it only served for this petitioner would have been a trial apart from that of petitioner's co-defendant if in fact petitioner had to retain attorney Jerry H. Roberts as counsel. In this point, petitioner exhibits that his attorney was ineffective on the added ground of not moving the court for a severance because he would not receive a fair trial if he were tried with his co-defendant, Thomas Sims.

Due to this, petitioners trial was prejudiced by irrelevant other crimes to which there was no showing of any involvement of petitioner therein, and the evidence in this case could not have been so complex if petitioners charges could have been tried separately. See: United States v. Frazier, et al, 3rd Cir. 1968 395 F. 2d 693, Schaffer v. United States, 362 US 511, 513 (1960), Cleaventhal v. United States, 332 US 532, 539, 540(1947), United States v. Kelley, 30[illegible] F. 2d 120 United States v. Lawson, 319 F. 2d 926, 956, Crooks v. United States, 375 US 940.

The evidence in this case involved a [illegible] acts alleged to have been committed by defendant Sims. The petitioner was fond of similar checks allegedly cashed by Sims, which were continuously displayed to the jury, which was error as to petitioner. The Court in Kotteakos, et al v. United States, 328 US 750 stated:

"The danger of transference of guilt from one to another across the line separating conspiracy, substantively or otherwise, are so great that no one really can say that a prejudice to substantial rights has not taken place."

See also, United States v. Iannelli, 477 F. 2d. 999, The real question when the courts decided in these cases was whether more trials should be allowed in the name of expediency or whether a fair and impartial trial of each defendant should be allowed in the name of justice.

In some Circuits, it is [illegible] a denial of effective assistance to be forced to share counsel. In others it is not. Petitioner asks this Court to decide just what the law is.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LARIS HURST,

Petitioner

v

CIVIL ACTION

UNITED STATES OF AMERICA,

5-70519

Respondent

/

JUDGMENT AND ORDER DENYING MOTION
TO VACATE SENTENCE

At a session of said Court held in the Federal Building and U. S. Courthouse, Detroit, Michigan, on this 21st day of August, A. D. 1975.

PRESENT: HONORABLE RALPH M. FREEMAN
United States District Judge

For the reasons set forth in a Memorandum Opinion of this Court dated August 21, 1975 filed herein;

IT IS HEREBY ORDERED AND ADJUDGED that petitioner's Motion to Vacate Sentence be and hereby is denied.

RALPH M. FREEMAN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LANIS HURST,

Petitioner

v

CIVIL ACTION

UNITED STATES OF AMERICA,

5-70519

Respondent

/

MEMORANDUM OPINION

Petitioner, Lanis Hurst, is presently incarcerated at the United States Penitentiary at Atlanta, Georgia. He brings this motion to vacate sentence under 28 USC §2255, alleging that his 1972 conviction for bank robbery was unconstitutional. Petitioner raises three claims: (1) representation at trial by the same attorney representing his co-defendant resulted in a conflict of interests leading to ineffective assistance of counsel; (2) he was denied the right to confront witnesses against him; and (3) he was denied effective assistance of counsel on appeal.

The respondent has filed an answer in opposition to the petitioner's motion to vacate.

The facts relevant to disposition of this motion are as follows: On August 1, 1972, petitioner Lanis Hurst, his co-defendant Thomas Sims and two other individuals were indicted for bank robbery in violation of 18 USC §2113(a)(d) and 2(a). On September 24, 1972, a pretrial was conducted; at that time the trial court had no notice of any inconsistent defenses requiring further inquiry. On October 11, 1972, trial by jury began. The government introduced the testimony of eyewitnesses who identified petitioner and Sims as the participants in the robbery of the bank. In addition, the case against Sims was buttressed by testimony of two additional witnesses establishing that he subsequently

FBI agent gave testimony about a confession by co-defendant Sims regarding his participation in the robbery.

Petitioner alleges that he was forced to share an attorney[1] with his co-defendant at a joint trial and that this resulted in ineffective assistance of counsel and denial of a fair trial in that neither petitioner's attorney nor the trial court informed the petitioner of his "organic right to separate counsel." Petitioner further alleges that the record shows no waiver of the right to his own attorney and that he was not learned in the law so as to be knowledgeable about such matters.[2]

Petitioner cites Lollar v. United States, 376 F2d 243 (C.A.D.C., 1967) as authority for the proposition that a defendant in a criminal proceeding who was required to share counsel with his co-defendant was denied effective assistance of counsel. In Lollar, the court used the standard of "reasonable doubt" to determine whether or not the accused had been prejudiced by the fact that he shared the same counsel with his co-defendant. The court held that a defendant who has been prejudiced by the sharing of counsel

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1/ Mr. James E. Roberts, Chief of the Detroit Federal Defender Office.

2/ The files of this Court indicate that petitioner has filed two prior §2255 motions. On February 28, 1973, petitioner filed a motion to vacate sentence under §2255, alleging that the trial court erred in considering petitioner's attempt to escape from custody during the trial and an alleged assault upon the jail turnkey in imposing sentence. This motion was denied on May 21, 1973. In the meantime, a second motion to vacate sentence was filed on behalf of petitioner on May 2, 1973, requesting resentencing because petitioner's counsel had inadvertently permitted the appeal period to lapse. In an affidavit attached to this motion, Mr. Roberts, the trial attorney, stated "that Lonis Hurst and Thomas Eugene Sims indicated their desire and intention to appeal on the day of their sentencing. However, they specifically requested that neither I nor any member of the Federal Defender Office handle said appeal." Nevertheless, the Court granted this motion and subsequently re-sentenced both defendants so they could take an appeal which was done and the convictions affirmed by the Sixth Circuit Court of Appeals on February 10, 1975.

In neither motion did petitioner allege deprivation of his right to a fair trial and to the effective assistance of counsel because he shared the same counsel as his co-defendant. The Sixth Circuit has stated that there is an inference of invalidity regarding tardy §2255 claims that a petitioner could have asserted earlier and failed to do so, Hilboe v. United States, 299 F2d 254, 256 (6th Cir. 1962).

and who has not waived objections thereto must be granted a new trial. United States v. Bell, 506 F2d 207, 224 (C.A.D.C., 1974).

The majority of circuits that have considered this question have held that representation of co-defendants by the same attorney is not per se a denial of the effective assistance of counsel nor does the trial court have to advise the defendant of the right to separate counsel in the event of a conflict of interest, United States v. Boudreaux, 402 F2d 557, 558 (5th Cir. 1974) and cases cited therein; United States v. Wayman, 510 F2d 1020, 1026 (5th Cir. 1975).

A minority of circuits require a new trial in situations where a defendant has had to share an attorney with his co-defendant and has not affirmatively waived objections thereto, United States v. Bell, supra; United States v. Foster, 469 F2d 1 (1st Cir. 1972); United States ex rel Hart v. Davenport, 478 F2d 203 (3rd Cir. 1973).

The Court of Appeals for the Sixth Circuit has considered the issue of representation of co-defendants by one attorney in United States v. Georgassilis, 498 F2d 883 (6th Cir. 1974) where joint defendants were charged with a violation of 18 USC §242. Both defendants retained the same attorney. One co-defendant was granted a new trial because after trial he decided to testify on his own behalf. The second defendant appealed the denial of a motion for new trial as to him. The appellate court discussed the issue of joint representation of co-defendants by one attorney. The Court stated that where one defendant has a defense inconsistent with that of his co-defendant, it is impossible for one attorney to adequately represent the interests of both defendants at a joint trial. Thus, where the possibility of inconsistent defe is brought to the attention of the trial court, the court should inquire into the nature of the conflict and, if necessary, strongly

suggest that the defendants have separate counsel. The court concluded that in Georgantilis the appellant was not prejudiced by joint representation. The briefs and the records in the case did not suggest that the defendant had any defense that was not raised nor that there existed any evidence not submitted at trial. Thus, the court found no basis for a new trial.

In the matter pending before us, it is clear that the trial court had no notice of any inconsistent defenses before trial. There is no suggestion that the petitioner had any defenses that were not raised at trial or that there was any evidence exonerating petitioner that was not submitted to the jury.

Petitioner alleges that at the trial, mention was made of other crimes with which petitioner had no connection. One witness for the government testified that he received proceeds of the bank robbery from co-defendant Sims as payment for narcotic-related debts. The manager of a supermarket testified that Sims attempted to cash a fifty dollar traveller's cheque at his store. However, while this testimony did not relate to petitioner, the prosecution had already presented testimony clearly identifying both petitioner and Sims as the bank robbers. The additional evidence against Sims was merely cumulative and cannot be considered prejudicial with regard to petitioner since the elements of the offense of bank robbery had already been established against both defendants.

Petitioner claims that he was denied the right to confront the witnesses testifying against him because he could not cross-examine his co-defendant regarding the "broad scope of a confession" made by Sims to an FBI agent. We note that the confession by its terms involved Sims. It is clear that petitioner could not have compelled Sims to take the stand so that he could interrogate him about the confession since Sims has an absolute right to refuse to testify against himself under the Fifth Amendment. Petitioner's attorney rigorously cross-examined the FBI agent regarding the confession

In his brief, petitioner notes that no instructions regarding the use of co-defendant Sims' confession were requested by petitioner's attorney nor given by the trial court. In United States v. Fleming, 504 F2d 1045, 1050 (7th Cir. 1974), a defendant during the course of trial pleaded guilty to the offense charged, and three other co-defendants requested a severance. The court stated that Bruton v. United States, 391 U.S. 123 (1968) requires that steps be taken to protect the Sixth Amendment rights of a defendant if the prosecution intends to use the confession of a co-defendant against the co-defendant at a joint trial. The court interpreted Bruton as suggesting that separate trials be granted or that deletions of any references to co-defendants be removed from the confessions before admission at trial. The court then held that where the individual pleading guilty did not refer to his co-defendants in his plea, there was no violation of their Sixth Amendment rights.

In the matter before us, Sims' confession did not refer in any manner to Hurst. It concerned only Sims' feelings regarding the probability of punishment. Therefore, we conclude that under the Fleming case, it could properly be utilized at a joint trial and that limiting instructions were unnecessary since there were no references to Hurst in the confession.

Petitioner further alleges that his counsel should have moved for severance. Rule 14 of the Federal Rules of Criminal Procedure provides that if it appears that a defendant is prejudiced by a joinder of defendants for trial, the court may grant a severance. On the record before us, we fail to see how the petitioner was prejudiced by being tried jointly with his co-defendant. We acknowledge that there was in fact some testimony regarding Sims presented at trial, but the elements of the offense of bank robbery were established against both defendants before introduc-

duction of the additional, cumulative evidence against Sims. Thus, we conclude that the failure of petitioner's counsel to move for a severance did not deny petitioner the effective assistance of counsel.

Petitioner's last claim is that he was denied effective assistance of counsel on appeal because no issues were raised as to him on appeal and the opinion of the Sixth Circuit affirming his conviction mentions him by name only in the caption of the decision. Petitioner does not make any showing of issues that should have been raised on his behalf, and our review of the record did not reveal any errors that should have been brought to the attention of an appellate court.

In Beasley v. United States, 491 F2d 687 (6th Cir. 1974), the court stated that the applicable test for the effective assistance of counsel is "counsel reasonably likely to render and rendering reasonably effective assistance." Defense counsel may not, under Beasley, deprive a criminal defendant of a substantial defense. Since petitioner does not suggest any issues that should have been appealed, his claim of ineffective assistance of counsel on appeal must fail.

In view of the above, petitioner's motion to vacate sentence will be denied.

RALPH M. FREEMAN
United States District Judge

Dated: August 21, 1975.

TO: Louis Hurst, Box [illegible] #96064, Atlanta, Georgia 30315

Loren G. Keenum, Assistant U. S. Attorney, 8th Floor, Federal Building, Detroit, Michigan [illegible]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAN 3 - 1977

LANIS HURST)
)
Petitioner-Appellant)
) O R D E R
vs.)
)
UNITED STATES OF AMERICA)
)
Respondent-Appellee)

BEFORE: PHILLIPS, Chief Judge, PECK and LIVELY, Circuit Judges.

This case is before a panel of the Court by assignment pursuant to Rule 3(c), Rules of the Sixth Circuit. This is an appeal from the denial of petitioner's third motion to vacate sentence pursuant to 28 U.S.C. §2255 since his conviction of armed bank robbery. The bases of the present motion were not relied upon in either of the earlier §2255 motions.

In the present proceedings petitioner claims that he was denied the effective assistance of counsel by being represented at the trial by the same attorney appointed to represent his co-defendant Thomas Sims. It is also charged that the attorney appointed to represent petitioner on appeal to this Court, whose his conviction was affirmed in United States v. Hurst and Sims, 510 F.2d 1035 (6th Cir. 1975), rendered ineffective assist[illegible]

A review of the record before us, including the brief filed by petitioner, leads to the conclusion that the questions upon which decision of this case depends do not require further argument. Rule 8, Rules of the Sixth Circuit.

The judgment of the District Court is affirmed for the reasons stated in the Memorandum Opinion of Judge Ralph M. Freeman dated August 21, 1975.

ENTERED BY ORDER OF THE COURT

Clerk

No. 75-6207

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

LANIS HURST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

Neither the order of the court of appeals (Pet. App. 8-9) nor the opinion of the district court (Pet. App. 2-7) is reported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1976. The petition for a writ of certiorari was filed on February 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether appointed counsel's failure to raise any issue on petitioner's behalf on direct appeal of his conviction denied petitioner the right to counsel.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner and co-defendant Thomas Sims were convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) and 18 U.S.C. 2(a). Petitioner was sentenced to twenty years' imprisonment. Both defendants were represented by one attorney, who was not the same attorney who was assigned to their appeal.

On direct appeal of their convictions,[1/] the court of appeals appointed one attorney to represent both petitioner and Sims. Although the brief filed by counsel in the court of appeals referred to petitioner in the caption, he was not mentioned in the text. The brief presented no issue on petitioner's behalf, nor would the arguments raised on behalf of his co-defendant have entitled petitioner to a new trial even had they been accepted by the court of appeals.[2/] After that

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1/ Following their conviction, petitioner and Sims initially filed a motion to vacate their sentences under 28 U.S.C. 2255, on the ground that the trial court had improperly considered their attempted escape and an assault on a turnkey in assessing their sentences. The district court denied that motion, the court of appeals affirmed, and this Court denied certiorari (419 U.S. 1123).

Petitioner and Sims meanwhile had filed a second Section 2255 motion requesting that they be resentenced, because their trial counsel inadvertently had permitted the appeal period to lapse. The district court granted that motion, vacated their original sentences, and resentenced them to the same terms. The direct appeal of their convictions followed.

2/ Those issues involved the destruction of an F.B.I. agent's notes of an interview with Sims, in which he admitted his involvement in the bank robbery, and a claim of prejudicial introduction of evidence of other crimes committed by Sims because the F.B.I. agent stated that this interview occurred in a jail.

on direct appeal, the district court denied petitioner's motion (Ibid.). Petitioner, still acting pro se, appealed. The court of appeals affirmed for the reasons stated by the district court (Pet. App. 9).

ARGUMENT

If petitioner had meritorious arguments to present on appeal, counsel's failure to mention him in the brief would appear to constitute ineffective assistance. But if petitioner had no such argument, counsel's responsibilities were governed by the standards of Ellis v. United States, 356 U.S. 674, and Anders v. California, 386 U.S. 738. The likely explanation of appellate counsel's failure to mention petitioner is that he implicitly concluded that petitioner had no arguable issue to present to the Sixth Circuit.

In Ellis the court of appeals denied petitioner leave to proceed in forma pauperis after counsel, appointed by the court of appeals, informed that court that petitioner had no meritorious issues to present on appeal. The Solicitor General confessed error, and the Court reversed. It wrote (356 U.S. at 675):

> In this case, it appears that the two attorneys appointed by the court of appeals, performed essentially the role of amicus curiae. But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied.

petitioner's counsel on direct appeal did not follow the procedure established by Ellis.

Anders held that, when an attorney for an indigent defendant concludes that his client's case is frivolous, counsel may request the appellate court's permission to withdraw from the case, but he must accompany his request with a brief referring to anything in the record that might support the appeal. 386 U.S. at 744-745. The indigent must be furnished with a copy of that brief and afforded an opportunity to raise any points that he considers significant. With the guidance furnished by the advocate's prior review of the record, the appellate court then must fully examine the proceedings below to determine if the appeal is wholly lacking in merit (ibid.). If it finds the case to be so lacking in substance that an appeal in a paid case would have been dismissed (see Ellis, supra, 356 U.S. at 675), the appellate court then may grant counsel's request to withdraw and may dismiss the appeal. But if it determines that any of the legal issues presented are arguable on their merits, it must afford the indigent assistance of counsel who will pursue the appeal as an advocate rather than as an amicus. See Douglas v. California, 372 U.S. 738; Coppedge v. United States, 369 U.S. 675.

Here, it appears that petitioner was not afforded even the degree of assistance provided by the "no-merit" letter held constitutionally inadequate in Anders. Although appellate counsel failed to advance any argument on petitioner's behalf,

he did not seek to withdraw his representation; thus, he preserved the appearance that he was actively representing petitioner's interest. The record leads us to conclude that petitioner was in effect abandoned by his attorney on direct appeal and that he has never received legal assistance in presenting any arguments he may have to overturn his conviction. Although petitioner's motion for the dismissal of counsel may have alerted the court of appeals to the necessity of considering his position with care, the circumstances forced it to review the trial transcript without the perspective and guidance provided by an advocate's participation.[5/] Anders and Ellis held that even if counsel ultimately determines that the direct appeal should not be pursued, the criminal defendant is entitled to an adversarial presentation of all arguable issues on his behalf so that the reviewing court can fully satisfy itself that the questions presented are indeed frivolous.[6/] Petitioner was afforded no such protection in this case.

Even though we would argue in the appropriate forum that the issues raised by petitioner in his Section 2255 motion do not entitle him to a new trial and would not have

5/ The court of appeals' opinion on direct appeal does not advert to any of the issues raised by petitioner in his motion for dismissal of counsel.

6/ That the court of appeals denied petitioner's motion for dismissal of counsel without prejudice to his right to file a brief on his own behalf is not dispositive. Anders established that if counsel suggests to the court that there is no proper basis for an appeal, the defendant must be provided an opportunity to respond to the brief accompanying counsel's motion to withdraw, so that he may raise any issues that he believes the court must consider. Id. at 744.

required a reversal of the conviction on direct appeal, we do not believe that those contentions can be dismissed as not arguable on their merits. The district court's considered opinion on these claims (Pet. App. 2-7) supports this assessment. Therefore, we submit that petitioner must be afforded the assistance of counsel to present any non-frivolous arguments against his conviction to the court of appeals. The proceeding should be treated as if it were the direct appeal from his conviction.

CONCLUSION

The petition for a writ of certiorari should be granted and the case remanded to the court of appeals with directions that counsel be appointed to represent petitioner in that court in order to proceed as if on direct appeal from the judgment of conviction.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1976.